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Visit to Tunisia

Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*

Summary

In his former capacity as Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson conducted a visit to Tunisia from 30 January to 3 February 2017 to assess the progress achieved by Tunisia in its law, policies and practice in the fight against terrorism, measured against its international human rights obligations. Despite many positive developments, the Special Rapporteur still has some concerns. In his report, he shares some observations and recommendations with regard to the abusive use of emergency legislation and powers vested in the police; the overbroad definition of terrorism in national legislation; prolonged periods of detention; the conditions of detention; the use of executive orders to restrict freedom of movement and impose house arrest without proper judicial review; allegations of ill-treatment and torture; and the use of counter-terrorism law and other legislation against journalists. With regard to the return of foreign terrorist fighters and their families, the Special Rapporteur reminds the Government that collective expulsions are strictly prohibited by international law and that it must respect the absolute prohibition against the violation of the non-refoulement principle under customary law. He recommends that the Government take appropriate measures to protect the rights of the children and families of foreign terrorist fighters returning to Tunisia in accordance with its obligations under international law, in particular international human rights law, humanitarian law and refugee law.

* The summary of the report is being circulated in all official languages. The report itself, which is annexed to the summary, is being circulated in the language of submission and Arabic only.

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Annex

Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on his visit to Tunisia

I. Introduction

1. In his former capacity as Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson conducted a visit to Tunisia from 30 January to 3 February 2017 at the invitation of the Government. The purpose of his visit was to assess the progress achieved by Tunisia in its law, policies and practice in the fight against terrorism, measured against its international human rights obligations, in particular with regard to the investigation, detention, arrest and trial of terrorist suspects, measures taken to prevent terrorism domestically and abroad, and the rights of victims of terrorism and persons negatively affected by counter-terrorism measures.

2. The Special Rapporteur thanks the Government of Tunisia for having extended an invitation to him to visit the country and commends the transparency and the constructive and cooperative way in which the Government facilitated his visit, which allowed a frank and open dialogue. Furthermore, the Special Rapporteur would like to thank the United Nations system in Tunisia, in particular the Office of the United Nations High Commissioner for Human Rights, the United Nations country team and the Resident Coordinator's office in Tunis for providing valuable support throughout his visit.

3. The Special Rapporteur is particularly grateful to the heads of all governmental institutions whom he met. He had valuable exchanges of information and views with the Minister of Justice, the Minister of Defence, the Minister for relations with constitutional bodies, the Secretary of State to the Minister of Foreign Affairs, the Senior Adviser to the President for counter-terrorism issues, prosecutors and investigative judges of the counter-terrorism judicial authority (pôle judiciaire de lutte contre le terrorisme), the Head of the Central Bank of Tunisia and the Tunisian Financial Analysis Committee, the national commission on counter-terrorism, the national commission for the prevention of torture and magistrates of the court of first instance of Tunis.

4. The Special Rapporteur also had discussions with law enforcement officials from the counter-terrorism unit of the judicial police, officials from the general directorate for international cooperation and senior management at the Ministry of the Interior, the Presidents of the High Committee on Human Rights and Fundamental Freedoms and the Truth and Dignity Commission and representatives of the Independent High Authority for Audiovisual Communication, the National Institution for the Protection of Personal Data and the National Union of Tunisian Journalists. He also met with lawyers, journalists and civil society organizations. The Special Rapporteur visited the Mornaguia prison and the Gorjani judicial police facility.

5. The Special Rapporteur shared his preliminary findings with the Government of Tunisia at the end of his visit, on 3 February 2017.

II. General context pertaining to human rights and counter-terrorism

6. Since 2014, Tunisia has lived under the threat of security attacks and suffered an increasing number of acts of terrorism. Initially attacks occurred in the mountainous regions bordering Algeria, where several law enforcement officials were assassinated by groups described as "terrorists". These security challenges culminated in 2015 with two deadly

terrorist attacks — at the Bardo Museum in Tunis in March and on a beach in Sousse in June — causing the death of over 60 civilians. Both attacks had devastating consequences on the Tunisian tourism industry, a major sector of the economy, and prompted the Government to adopt significant security measures. Another attack took place in Tunis in November 2015, when a bus carrying Tunisian presidential guards was attacked and exploded on one of the main avenues in Tunis. Since then, security incidents and terrorist attacks have mainly affected the border areas with Libya and the mountainous region bordering Algeria. One of the most deadly of these attacks took place in March 2016 in Ben Guardene, on the Libyan border, which killed 54 people. Against this backdrop, authorities have faced the challenge of having to respond to these threats and incidents in a way that conforms with the country's international human rights obligations.

7. Although the Government intensified its counter-terrorism efforts in 2016, terrorism remains a serious challenge. Currently, according to the authorities, there are four types of terrorist threats facing the country: the presence of armed groups in the mountains in the north; the presence of sleeper cells and support for active terrorist groups; trafficking in arms coming from Libya; and the issue of foreign terrorist fighters returning from conflict zones in Iraq, Libya and the Syrian Arab Republic. As of 2014, according to unofficial sources, up to 6,000 foreign fighters from Tunisia, mostly male but also including female jihadists, were estimated to have travelled to join various armed groups, usually Islamic State in Iraq and the Levant, in Iraq and the Syrian Arab Republic. By 2017, the number of such fighters was estimated to be about 3,000, a large number either having been killed in combat or having returned home. The socioeconomic conditions that laid the ground for the 2011 events of popular unrest and related change of regime have since further deteriorated owing to terrorist attacks and other insecurity factors. There has been a growing sense of frustration and social discontent, in particular in the south and south-west of the country, with calls for jobs, equal economic opportunities and transparent wealth distribution. Limited economic improvements and a high unemployment rate, particularly affecting youth, have made certain regions of Tunisia fertile ground for recruitment by radical groups.

III. Legal framework

A. International human rights obligations of Tunisia

8. Tunisia is a party to all the main international human rights treaties, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, including some optional protocols to these treaties. It is also party to the Rome Statute of the International Criminal Court, the Convention on the Prevention and Punishment of the Crime of Genocide, the Geneva Conventions of 12 August 1949 and the protocols additional thereto, 63 International Labour Organization (ILO) conventions and 1 ILO protocol, including all 8 ILO fundamental conventions, the Convention against Discrimination in Education and the Convention relating to the Status of Refugees and its Protocol relating to the Status of Refugees.[1]

9. Tunisia has accepted most of the individual complaint procedures established under United Nations human rights treaties, including for the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of Persons with Disabilities and the Convention against Torture. Additionally, Tunisia has accepted the inquiry procedure under the

[1] For a full overview of the scope of the human rights treaty obligations of Tunisia, see document A/HRC/WG.6/27/TUN/2, annex. Available from www.ohchr.org/EN/HRBodies/UPR/Pages/TNIndex.aspx.

Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture, the International Convention for the Protection of All Persons from Enforced Disappearance and the Convention on the Rights of Persons with Disabilities.

B. National legal framework

10. Following the popular uprising in Tunisia demanding social, economic, civil and political rights, which began on 17 December 2010 and culminated in the ousting of President Ben Ali on 14 January 2011, Tunisia entered a period of transition during which time it has become a beacon of hope in the region. Its commendable efforts in preventing violent extremism and countering terrorism should be grounded in human rights so that it could serve as a model in this area for the region and beyond.

11. Since the adoption of the new Constitution on 26 January 2014, Tunisia has held parliamentary elections, in October 2014, and presidential elections, in November and December of the same year. On 2 December, the first democratically elected parliament began implementing the new Government's ambitious plans by adopting laws to reform the legal and judicial system, as stipulated in the Constitution, including counter-terrorism legislation.

12. The preamble to the Constitution stipulates that the State is built on the principle of the separation of powers and a balance between them. It also declares that the State must guarantee the supremacy of the law, respect for freedoms and human rights, the independence of the judiciary and equality of rights and duties between all male and female citizens. Article 20 of the Constitution also affirms that the State's international obligations take precedence over domestic law.

13. Chapter V of the Constitution establishes the judicial power as one of the three branches of State. It includes important guarantees for the independence of judges, prosecutors and lawyers as the main actors of the judicial system. The Supreme Judicial Council, established by articles 112 to 114 of the Constitution, is responsible for the effective administration of justice and the independence of the judiciary. Article 113 affirms that the Supreme Judicial Council is self-managed and ensures the Council's administrative and financial independence: the Council is mandated to prepare its own draft budget and discuss it before the competent parliamentary committee. The Constitution also establishes the Constitutional Court as an independent judicial body that oversees the constitutionality of laws, besides performing other tasks specified by the Constitution.

14. Following a number of terrorist attacks, the President of Tunisia declared a state of emergency, in accordance with article 80 of the Constitution, which lasted from July 2015 until October 2015. A state of emergency was declared again in the aftermath of the November 2015 attack and has been extended several times ever since, most recently in November 2017 for three months. The Special Rapporteur expresses his concern about the legality and persistent extension by the President of the far-reaching emergency powers provided to law enforcement officials under Presidential Decree No. 78-50 of 26 January 1978 regulating a state of emergency.

15. On 7 August 2015, Tunisia reinforced its antiterrorism legislation with the promulgation of the Organic Law on the Fight against Terrorism and Money-laundering, which repealed and replaced the 2003 antiterrorism law. Since the 2011 political change, investigation and prosecution authorities had been reluctant to invoke the 2003 law, because many in Tunisian society believed that it had been one of the instruments of political repression of the previous regime. The 2015 Law promotes increased protection of human rights, including measures to strengthen attorney-client and doctor-patient privileges and the right of journalists to protect their sources (art. 37) and criminalizes unauthorized government surveillance (art. 64).

16. The 2015 Law provided for the creation of a new national commission on counter-terrorism and streamlined the handling of terrorism cases by referring them to the counter-terrorism judicial authority in Tunis — a unit of judges and members of the criminal

investigation department specialized in terrorism cases — rather than to judicial units at the governorate level. The 2015 Law includes all the offences addressed in the 19 international instruments on terrorism.[2] Despite the obvious improvements in the new Law, it still contains a number of flaws that are highlighted in the present report.

17. In November 2016, the President approved the National Strategy to Combat Terrorism and Violent Extremism. The strategy contains four pillars: prevention, protection, prosecution and response. The prevention pillar addresses the root causes of terrorism and violent extremism; legally prohibits incitement; stresses the role of education in promoting a culture of peace, dialogue, tolerance and respect for different cultures and beliefs; fosters the prevention of radicalization in prisons; promotes the protection of vital infrastructure; and organizes the exchange of information and coordination of activities. The protection pillar deals with issues related to combating terrorism; developing counter-terrorism protection plans; cooperation between intelligence agencies; organizing up-to-date information and communication systems; setting up border control mechanisms; and controlling the financing of terrorism. The prosecution pillar seeks to strengthen national capacities to fight terrorism through legal and judicial measures and by enhancing international legal cooperation. The response pillar provides for a globally and regionally aligned crisis response and management mechanism, which addresses victims of terrorism, the role of protected witnesses and the rights of detainees.

18. The Special Rapporteur commends the commitment expressed by all the official authorities and institutions to counter terrorism and prevent violent extremism not only through security measures but also through concerted action in the social, political, economic, judicial and human rights spheres. He has received assurances that the 2016 National Strategy to Combat Terrorism and Violent Extremism was drafted in this spirit and takes into account United Nations standards in this regard. The Special Rapporteur calls on the authorities to make the strategy public and to translate it into a concrete and well-coordinated national action plan for each ministry. It should prescribe the role of each governmental agency in contributing towards prevention, protection, prosecution and response through the application of a human-rights-centred approach and should set specific deadlines for action. The Special Rapporteur stands ready to provide technical or advisory assistance to the Government in this regard.

IV. Key human rights concerns

19. Despite many positive developments, challenges remain. The Special Rapporteur would like to share some observations, concerns and recommendations with regard to the abusive use of emergency legislation and powers vested in the police; the overbroad definition of terrorism in national legislation; prolonged periods of detention; the conditions of detention; the use of executive orders to restrict freedom of movement and impose house arrest without proper judicial review; allegations of ill-treatment and torture; and the use of counter-terrorism law and other legislative acts against journalists.

A. Definition of terrorism under the counter-terrorism legislation

20. The Special Rapporteur is concerned that the definition of terrorism contained in the 2015 Law is overly broad and fails to comply with international human rights standards of legal certainty. Even though the law includes a preamble explicitly emphasizing the importance of respect for constitutional rights and international conventions in the field of human rights and humanitarian law, the way it defines terrorism remains ambiguous. The law defines as a terrorist offence,[3] inter alia, the act of "causing harm to private and public property, vital resources, infrastructure, means of transport and communication, information technology systems or public services" when it is part of an individual or

[2] For a full list of the international legal instruments to prevent terrorist acts, see www.un.org/counterterrorism/ctitf/en/international-legal-instruments.

[3] The actus rei are listed in articles 14 to 36 of the 2015 Law.

collective enterprise aiming[4] at intentionally spreading terror among the population or forcing the Government or an international organization to take or refrain from taking action. Such a definition could allow the repression of certain non-violent acts that are not of a terrorist nature as defined by international law.

21. Furthermore, several provisions of the 2015 Law carry the risk of the gradual broadening of the definition of terrorism to acts that do not amount to, and do not have sufficient connection to, acts of serious violence or harm. Article 5 prohibits incitement to terrorism and article 31 prohibits the "praising and justification of terrorism" using a broad definition that fails to respect international law requirements regarding the right to freedom of expression. In accordance with the 2015 Law, any person who is found to have "publicly and clearly praised" a terrorist crime, the perpetrator of a terrorist crime or an organization or an alliance connected with terrorist crimes, their members or their activities, could be sentenced to up to five years in prison. Terrorism offences also include accusation of apostasy, including *takfeer* (calling another Muslim an unbeliever); promoting or inciting hatred or animosity between races, doctrines and religions; and promoting or praising terrorism, which is punishable by one to five years of imprisonment and a fine of 5,000 to 10,000 dinars. These articles pose a clear risk of unjustified restrictions on the freedom of expression of individuals and groups that legitimately and peacefully exercise their right to freedom of expression.

22. The Special Rapporteur considers that any definition of terrorism should be confined to acts or threats of lethal violence that are committed for political, religious, ideological or any other motives and that are aimed at spreading fear or terror among the public or parts of the public or to coerce a population, a government or an international organization to take or refrain from taking action. Contrary to the basic international human rights standards, the 2015 Law criminalizes a broad spectrum of acts of a non-violent nature, including the peaceful exercise of the rights to freedom of expression, assembly and association. The definition of terrorism may have a particularly negative impact on citizens in general, and civil society actors in particular, as simple demonstrations that may be accompanied by a certain amount of disorder could be criminalized as acts of terrorism. The implementation of the 2015 Law could thus result in excessive punishments being applied to people who are little more than peaceful protesters.

23. During his visit, the Special Rapporteur was informed that, since May 2015, 20 associations had been dissolved by judicial decision for having mishandled their funds or having links with terrorist acts, and 150 associations had been suspended by a secretary of State decision on similar grounds. In several cases, criminal prosecutions had been initiated against journalists and bloggers for reporting on terrorist attacks, which, despite the fact that the terrorist charges were eventually dropped, has fostered an atmosphere of fear among the media community in Tunisia. The denigration, in some media reports or by certain officials, of human rights non-governmental organizations and defenders following each terrorist attack, particularly during 2015, has contributed to a climate of fear and uncertainty and raises concerns about the State's implementation of its obligation to protect human rights defenders.

24. The Special Rapporteur recommends that the Government revise the definition of terrorism in the 2015 Law to bring it into line with the relevant provisions of Security Council resolutions 1373 (2001), 1456 (2003), 1566 (2004), 1624 (2005), 2178 (2014), 2341 (2017), 2354 (2017), 2368 (2017), 2395 (2017) and 2396 (2017); Human Rights Council resolution 35/34; and General Assembly resolutions 49/60, 51/210, 72/123 and 72/180. All these resolutions require that States ensure that any measures taken to combat terrorism and violent extremism, including incitement of and support for terrorist acts, comply with all of their obligations under international law, in particular international human rights law, refugee law and humanitarian law.

25. While there is no internationally agreed definition of terrorism, and States thus resort to establishing their own definitions, the Special Rapporteur stresses that Tunisia should ensure that national counter-terrorism legislation is limited to the countering of terrorism as

[4] The mens rea is defined in article 13 of the 2015 Law.

properly and precisely defined on the basis of the provisions of international counter-terrorism instruments and is strictly guided by the principles of legality, necessity and proportionality. The definition of terrorism in national legislation should be guided by the model definition proposed in Security Council resolution 1566 (2004) and also by the Declaration on Measures to Eliminate International Terrorism and the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, which were approved by the General Assembly.[5] The seriousness of, and punishment for, a criminal conviction must be proportionate to the culpability of the perpetrator. No one should be convicted of participating in a terrorist act, or facilitating or funding terrorism, unless it can be shown that that person knew or intended to be involved in terrorism as defined under national law.

B. Lack of due process before the counter-terrorism judicial authority

26. During the visit, the Special Rapporteur was informed that investigations and prosecutions were ongoing against more than 1,500 individuals accused of terrorist acts. Less than 10 per cent of those accused had been sentenced, and the rest continued to be deprived of their liberty for prolonged periods without having been found guilty of any offence. The Special Rapporteur encourages the authorities to accelerate efforts to complete these judicial proceedings, including by providing the counter-terrorism judicial authority with adequate human resources and by simplifying and shortening the complex procedures of the criminal justice system.

1. Lengthy pretrial detentions and prolonged investigations

27. In December 2014, the counter-terrorism judicial authority was established to decrease the number of cases dealt with by the court of first instance in Tunis. The authority is composed of the public prosecutor, investigating judges, indictment chamber judges and judges of the criminal and correctional chambers of first instance and appeal. It is tasked with investigating terrorism-related cases and transferring them to the judicial chambers of the court of first instance for adjudication. The Special Rapporteur notes with concern that there are only eight investigating magistrates assigned to deal with more than 3,000 pending cases. It is estimated that over 1,500 detainees are being held under terrorism-related charges.

28. The 2015 Law permits courts to close the hearings to the public and to withhold information on victims, witnesses or any other relevant person on the ground of confidentiality, including from the defendants and their legal counsel. The law also extends the period of police custody pending issuance of a charge to 5 days, renewable twice for a total of 15 days (arts. 39 and 41). Act No. 2016-5 amending the Criminal Procedure Code entered into force in June 2016. It prescribes access to a lawyer for detainees in police custody and during the pretrial detention period. However, access to a lawyer can be delayed for up to 48 hours in terrorism cases.

29. This provision raises serious concerns about the fairness of the proceedings. These concerns were confirmed by reports received by the Special Rapporteur about trial proceedings conducted in camera and the reliance by certain judges on self-incriminating confessions made during police custody. The Special Rapporteur received credible allegations of torture and other ill-treatment, arbitrary arrest, violation of the right to be informed of the charge and of the right to legal counsel, lack of independent medical examinations and the admission of evidence obtained by torture in breach of the State's obligations under article 7 of the International Covenant on Civil and Political Rights and article 15 of the Convention against Torture.

[5] See General Assembly resolutions 49/60 and 51/210, which have been continuously recalled by the Assembly in its resolutions on measures to eliminate international terrorism, most recently in its resolution 72/123.

2. Inhumane prison conditions

30. The Special Rapporteur is particularly concerned about the prison conditions he witnessed in the Mornaguia Prison, which are far from meeting international minimum standards. The prison is approximately 150 per cent over capacity, with more than 90 prisoners crammed into dormitories with inadequate space, natural light, sleeping and sanitary facilities. These conditions systematically violate the rights of prisoners and place a considerable burden on staff. These conditions affect all categories of prisoners. However, they disproportionately affect those charged with terrorism because they are less likely to be granted provisional release than other suspected offenders as their cases may take years to come to trial and they receive the longest sentences.

31. The Special Rapporteur is also concerned about the measures taken within the prison system to reduce the risk of terrorist recruitment and radicalization of prisoners. While conscious of the risk involved in allowing the free movement of prisoners, measures that segregate individuals in solitary confinement for prolonged periods may raise issues of inhuman and degrading treatment.

3. Use of torture and ill-treatment, and impunity

32. During the visit, the Government informed the Special Rapporteur that there were strong legal safeguards in place against torture and ill-treatment, such as the right to file a complaint about torture and ill-treatment, the right to legal counsel and the right to contact a person of one's choice upon arrest. All detainees are afforded these rights under the Tunisian Code of Criminal Procedure. The Government admitted that there had been several cases of torture and ill-treatment but said that all cases were treated and investigated diligently.

33. The Special Rapporteur was informed that 230 cases of torture had been presented to national courts, after pretrial investigation, between July 2014 and January 2015. Of these, 165 were still in the investigation phase in April 2016. The perpetrators were convicted in only two cases and were given suspended sentences. While disciplinary sanctions have at times been imposed against perpetrators of torture during the past five years, only one case resulted in a firm criminal conviction and sentence to two years' imprisonment, under article 101 bis of the Criminal Code. The Special Rapporteur notes with concern that in 2015 around 200 torture complaints were lodged but that, as of September 2016, no judgments had been issued, a number of complaints had been dismissed and the majority were still pending.

34. During his meetings with the representatives of civil society organizations, the Special Rapporteur was informed of the growing number of allegations of torture and ill-treatment made by lawyers and human rights groups during court proceedings. He was also told of the frequent excessive use of force during the arrest of persons suspected of terrorism offences, excessively long periods of pretrial detention and lengthy periods of detention without charges. Law enforcement officials have been complaining that after they arrest suspects the judiciary often releases them due to a lack of sufficient evidence or because of a legal vacuum. In some cases, family members of suspects have been arrested. These persons, sometimes arrested in groups, have alleged that they were ill-treated during the arrest and interrogation. The Special Rapporteur has also received reports about the practice of incommunicado detention of suspects before their arrest has been officially registered and claims of torture during such detention.

35. Reportedly, torture and ill-treatment occur in the security sector, in particular when a person is held in the custody of the police and the National Guard on terrorism-related charges. Although the police are under the authority of the public prosecutor during investigations, the Committee against Torture noted in its recommendations to Tunisia in May 2016 that the public prosecutor was not practically involved in monitoring interrogation but rather exercised judicial oversight over the measures taken by the police (CAT/C/TUN/CO/3, para. 15). The Committee also highlighted reports that the Ministry of the Interior had sometimes misinterpreted the counter-terrorism law by refusing to reveal the identity of officers suspected of torture to the judge in charge of the investigation.

36. The Special Rapporteur is concerned that impunity for acts of torture and ill-treatment remains widespread. He echoes the Committee against Torture, which expressed its concerns that, while torture was recognized as a crime in the Tunisian Criminal Code in article 101 bis, the definition of torture was not in conformity with the definition set out in article 1 of the Convention against Torture (ibid., para. 7). In particular it did not refer to punishment as one of the prohibited purposes of torture and limits "discrimination" to "racial discrimination". The Committee against Torture also noted with concern that article 101 quater provided for the exemption from punishment of public servants or their equivalents who denounced acts of torture "in good faith", which opened the door to impunity.

37. The Special Rapporteur is also concerned about consistent reports of a lack of due diligence by judges and judicial police when investigating allegations of torture or ill-treatment. These officials, who report to the Ministry of the Interior, are responsible for investigating cases of violence committed by State officials. The prosecutors receiving complaints of torture sometimes decide to conduct preliminary inquiries instead of sending the case to an investigating judge, thus preventing the victim from filing a criminal complaint and seeking damages.

38. The Special Rapporteur calls for increased vigilance by all authorities involved in implementing the Government's commitment to eradicate ill-treatment and torture. While commending the Government for its progress in this area, he expresses concern over the fact that allegations of torture or other forms of ill-treatment made by persons suspected or accused of acts of terrorism, their lawyers and human rights defenders do not systematically result in rapid and thorough independent investigations. He recommends, as an immediate step, the introduction of a legal and procedural reform to guarantee access to and the effective presence of a defence lawyer for those accused immediately upon their arrest and not 48 hours later, as is currently the case. He also recommends the installation of video cameras in all places where persons suspected of terrorism are detained and interrogated.

39. The Special Rapporteur welcomes the creation and election of the members of the national commission for the prevention of torture in March 2016. He urges the Government to ensure that this institution aimed at preventing torture is sufficiently funded through the State budget to ensure its effective and unimpeded operational capacity throughout the territory of the country and that its institutional independence is rigorously respected.

C. Abusive use of emergency powers in violation of international law

40. The Special Rapporteur is gravely concerned about the routine extension of states of emergency in Tunisia since July 2015 despite the decrease in the number of terrorist attacks in the country. According to the Ministry of the Interior, since the state of emergency was introduced, up to the time of the visit, security forces had conducted more than 500 house raids and had prevented at least 19,000 individuals from travelling to conflict zones in Iraq, Libya, the Syrian Arab Republic or elsewhere. Most of the restrictive measures described in the following paragraphs were ordered and implemented in the absence of judicial oversight. They resulted from secret administrative orders of the Ministry of the Interior. The Special Rapporteur is concerned that the lack of judicial oversight over these decisions denies those subjected to them the right to appeal the legality, necessity and proportionality of the measures imposed on them. The Special Rapporteur regrets that, despite his appeal to the Government at the end of his visit, this abusive practice continues.

1. Abusive imposition of house arrest

41. According to the Government, since the declaration of the state of emergency in July 2015 about 150 individuals have been placed under house arrest. This measure appears to be taken without any legal basis in the 2015 Law. The persons targeted were all considered high risk security detainees. No arrest warrants were issued by competent courts. The arrests followed secret administrative orders by the Ministry of the Interior.

42. Presidential Decree No. 78-50 of 26 January 1978 regulating a state of emergency empowers the Ministry of the Interior to place an individual considered to be a security

threat under house arrest or to confine him or her to a specific area and to exercise control over the execution of such orders (art. 5). House arrest orders appear to be issued for an unlimited duration and require the individual subjected to them to report twice a day to, and to sign in at, the local police station.

43. The Special Rapporteur urges the Government to fulfil its obligation under article 9 of the International Covenant on Civil and Political Rights to protect all individuals from arbitrary deprivation of liberty. According to the Human Rights Committee's general comment No. 35 (2014) on liberty and security of person, deprivation of liberty may take different forms, including house arrest. Hence, it can be imposed only by a judicial decision and is subject to appeal, in accordance with article 9 of the Covenant. The Committee's general comment No. 29 (2001) on derogations from provisions of the Covenant during a state of emergency clarifies that the right to take proceedings before a court is non-derogable and must be ensured at all times, even during a state of emergency.

2. Restrictions on freedom of movement and the right to travel abroad

44. With regard to restrictions on freedom of movement, the Ministry of the Interior has reportedly issued what are referred to as secret "S10 orders" under which individuals are normally confined to their city or town. Those placed under house arrest and S10 orders are notified of the restriction verbally by police and are not presented with a written document, the justification for and specific details of which could be questioned, challenged or appealed. The Special Rapporteur urges the Government to discontinue this practice as it is contrary to article 12 of the International Covenant on Civil and Political Rights.

45. Restrictions on the right to leave the country have also been imposed on people suspected of travelling to foreign countries as foreign fighters or to engage in terrorist activities. These restrictions appear to have no basis in the 2015 Law. Suspects have been systematically banned from leaving the country. There is no judicial order for or judicial oversight of the travel ban and those subjected to it do not receive any written order or explanation. This type of restriction on individuals' freedom of movement, preventing them from travelling abroad, similarly stems from secret administrative orders by the Ministry of the Interior, referred to as "S17 orders". The suspects are notified of the ban but do not receive any official document explaining its legal basis, thus preventing any possibility of challenging the restriction.

46. The Special Rapporteur reminds the Government of its obligation to ensure freedom of movement and the right to travel abroad under article 12 of the Covenant. Even if this right is restricted by an executive or law enforcement decision it must be legal, reasoned, justified and subject to judicial oversight and appeal.

3. House searches and surveillance

47. According to information received by the Special Rapporteur, persons suspected of terrorist activities or of being connected with individuals suspected of terrorist activities are often subjected to frequent house searches and to constant surveillance by the law enforcement authorities. These surveillance and search measures do not seem to be authorized by courts or submitted to judicial oversight. House searches are conducted without warrants and involve not only the houses of suspected individuals but also those of their relatives and of any individuals they are suspected to be in contact with. House searches are often conducted late at night, and it is often alleged that excessive force is used against suspects and their families. Presidential Decree No. 78-50 empowers the Ministry of the Interior to order searches both during the day and night (art. 8). In this regard, the Special Rapporteur would like to bring to the attention of the Government its obligation to respect the right to privacy and the inviolability of the home provided by article 17 of the Covenant.

4. Abusive use of emergency powers

48. The Special Rapporteur expresses his grave concern that the abusive use of the emergency powers granted in Presidential Decree No. 78-50 to law enforcement institutions impinges substantially on the full enjoyment of international human rights norms, including

those accepted by Tunisia, in particular the right to freedom of movement, the right to leave one's country and the right to privacy, and also the non-derogable right to challenge such restrictions in court, the prohibition against arbitrary deprivation of liberty and due process guarantees.[6] According to the information received from the United Nations depository, the Government of Tunisia has never submitted its notification of derogation from the corresponding provisions of the Covenant, which is a clear breach of the State's international obligations.[7]

49. The routine extension of the state of emergency with overreaching executive and law enforcement powers that infringe upon the full enjoyment of human rights and fundamental freedoms amounts to a permanent state of emergency, which is prohibited under international law. The routine extension of the state of emergency in the absence of a notification of derogation, detailing the rationale for the derogations, violates article 4 of the International Covenant on Civil and Political Rights. The Special Rapporteur urges Tunisia to undertake immediate measures to discontinue this abusive practice and repeal and replace current emergency legislation in line with its obligations under the article 4 of the Covenant.

D. Handling of foreign terrorist fighters and their families

50. Reports suggest that Tunisia is the biggest "country exporter" of foreign terrorist fighters to conflict zones in the region, in particular in the Syrian Arab Republic. The Government informed the Special Rapporteur that there were no official statistics on Tunisian nationals serving as foreign terrorist fighters in conflicts. However, some 5,000 to 7,000 Tunisian fighters are said to have joined groups of Islamic State in Iraq and the Levant in Iraq, Libya and the Syrian Arab Republic, although many of those fighters have been killed, and hundreds are estimated to have returned to Tunisia.

51. Some of the most recent figures shared by the Government date back to January 2015, when it was estimated that the total number of Tunisians who had fought in the Syrian Arab Republic as foreign terrorists was 2,800, including 600 killed and 568 returnees to Tunisia. Almost 90 per cent of these combatants joined Islamic State in Iraq and the Levant. The Ministry of the Interior informed the Special Rapporteur that it had detailed information about returnees and that among the measures taken against them were imprisonment, restriction of movement and tight security surveillance. The Special Rapporteur has observed a growing public sentiment against the return of these foreign terrorist fighters, regarded as a potential source of further violence in Tunisia and as a threat to national and regional security. According to some governmental officials, the return of foreign terrorist fighters and their interaction with sleeper cells may result in the formation of an armed organization against the State.

52. The Special Rapporteur is fully cognizant of the threat of further terrorist and other violent attacks posed by the return of foreign terrorist fighters and the violent radicalization of individuals on the fringe of society. The return home of individuals who may have committed all sorts of crimes, including terrorism, with an experience of warfare and combat, is no doubt an issue of utmost concern that any Government concerned with the protection of its population must take very seriously indeed. He must, however, remind the Government of its obligations under article 17 of the International Covenant on Civil and Political Rights, which states that everyone has the right to enter and leave one's own country. A delicate balance must thus be struck between countering terrorism and ensuring security in society, on the one hand, and ensuring the respect of human rights, on the other. In this regard, the Special Rapporteur advises the Government that any limitation of rights must be lawful, pursuant to a legitimate aim and necessary to achieve that aim. Collective expulsions are strictly prohibited by international law. States may only expel a person who is unlawfully on the territory or whose legality of entry or stay is disputed, pursuant to a decision reached in accordance with the law. If the Government is seeking to prevent

[6] Human Rights Committee, general comment No. 29, para. 16.

[7] International Covenant on Civil and Political Rights, art. 4, and general comment No. 29.

individuals from entering, or to remove individuals from, its territory, it must respect the absolute prohibition against the violation of the non-refoulement principle under customary and international human rights law, notably under the Convention against Torture or, insofar as such individuals are protected under the Convention relating to the Status of Refugees, must not place them at risk of persecution on the grounds identified in that Convention.

53. The Special Rapporteur recommends that the Government take appropriate measures to protect the rights of the children and families of the foreign terrorist fighters returning to Tunisia in accordance with its obligations under international law, in particular international human rights law, humanitarian law and refugee law.

V. Conclusions and recommendations

54. The Special Rapporteur commends the commitment and efforts of the Government of Tunisia to promote and protect human rights and fundamental freedoms while countering terrorism. Since 2014, Tunisia has suffered an increasing number of acts of terrorism and has lived under the threat of further attacks. As a party to almost all the main international human rights treaties, Tunisia has endeavoured to respect and to ensure to all individuals within its territory and subject to its jurisdiction all the rights related to, inter alia, the proper administration of justice, including the principle of equality before the law; the right to an effective remedy; the right to liberty and security; the presumption of innocence; the right to a fair and public hearing without undue delay by a competent, independent and impartial tribunal established by law; the fundamental procedural guarantees of persons charged with a criminal offence; and the principle of legality; as well as the fundamental freedoms of opinion and expression, religion or belief and peaceful assembly and association.

55. The Special Rapporteur welcomes the fact that the Government has undertaken the necessary reform of its counter-terrorism legislation by adopting the 2015 Organic Law on the Fight against Terrorism and Money-laundering and the 2016 National Strategy to Combat Terrorism and Violent Extremism. Its commendable efforts in preventing violent extremism and countering terrorism should, however, be more firmly grounded in human rights so that its could serve as a model in this area for the region and beyond.

56. The Special Rapporteur welcomes the creation of the national commission on counter-terrorism, the counter-terrorism judicial authority and the national commission for the prevention of torture. However, he notes with concern that the specialized judicial authority is underresourced and unable to effectively and efficiently deal with the growing workload, resulting in the prolonged deprivation of liberty of hundreds of individuals.

57. Along with these positive developments, the Special Rapporteur observed a number of serious issues with regard to the abusive use of emergency legislation and powers vested in the police, the overbroad definition of terrorism in national legislation, prolonged periods of detention, the conditions of detention, the use of executive orders to restrict freedom of movement and impose house arrest without proper judicial review, allegations of ill-treatment and torture and the use of counter-terrorism law and other legislative acts against journalists.

58. Specifically, the Special Rapporteur recommends that the Government and other relevant State institutions of Tunisia:

(a) Urgently review the definition of terrorism in the 2015 counter-terrorism law and bring it into line with the relevant provisions of United Nations Security Council resolutions 1373 (2001), 1456 (2003), 1566 (2004), 1624 (2005), 2178 (2014), 2341 (2017), 2354 (2017), 2368 (2017), 2395 (2017) and 2396 (2017); General Assembly resolutions 49/60, 51/210, 72/123 and 72/180; and Human Rights Council resolution 35/34. This should ensure that the law's definition is as narrow as possible and serves

as a basis to ensure that any measures taken to combat terrorism and violent extremism, including incitement of and support for terrorist acts, comply with all of the Government's obligations under international law, in particular international human rights law, refugee law and humanitarian law;

(b) Given the alleged use of torture under the counter-terrorism framework, the judiciary must ensure that coerced self-incriminating confessions, or confessions incriminating others, are inadmissible as evidence in court. The relevant authorities should also ensure that judges are aware of their obligation to listen to and promptly and thoroughly investigate any credible allegation by a defendant, his or her lawyer or his or her family, that he or she was subjected to torture or ill-treatment by investigators during interrogation for the purpose of obtaining self-incriminating confessions or information implicating others. Furthermore, they should ensure that Judges investigating such allegations are effectively protected against pressure, intimidation or any form of reprisal.

59. **As preventive measures against torture and ill-treatment of persons in law enforcement custody, the Special Rapporteur recommends that the Government:**

(a) Adopt legal and procedural reforms to guarantee the presence of defence lawyers immediately upon arrest, instead of only after 48 hours, and throughout the interrogation and investigation process;

(b) Install video cameras in detention and interrogation facilities;

(c) Ensure that defendants and other citizens bringing complaints of torture or ill-treatment are not subject to reprisals and that they receive adequate compensation if the allegation of torture is established;

(d) Ensure the availability of prompt, independent, adequate and consensual medical examinations at the time of arrest and at regular intervals thereafter. Medical examinations must also be provided as soon as a detainee enters a custodial or interview facility and upon each transfer;

(e) Ensure that the newly created national commission for the prevention of torture is fully and adequately funded through the State budget in order to ensure its effective and unimpeded operational capacity throughout the entire territory of the country;

(f) Ensure the complete operational independence of the national preventive mechanism under the Optional Protocol to the Convention against Torture;

(g) Introduce specific compulsory training programmes for law enforcement officials, investigators, prosecutors, judges and medical personnel, based on upon the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol).

60. **The Special Rapporteur also recommends that the Government:**

(a) Take immediate measures to discontinue the abusive, and internationally illegal, practice of routinely extending the extraordinary powers conferred to law enforcement institutions under the state of emergency, which de facto normalizes what should be an extraordinary legal regime;

(b) Repeal and replace its current emergency legislation in line with its obligations under article 4 of the International Covenant on Civil and Political Rights. The Government should repeal and replace Presidential Decree No. 78-50, which allows for the abusive use of emergency powers by the law enforcement authorities;

(c) Take immediate measures to ensure full respect for the law during the state of emergency and the full enjoyment by individuals of their non-derogable rights, including the right to access to courts and due process. The abusive use of house arrest, restrictions on freedom of movement and violations of privacy rights must stop;

(d) **Take appropriate measures in handling the departure and return of foreign terrorist fighters with a view to ensuring full respect of article 17 of the International Covenant on Civil and Political Rights on freedom of movement, while ensuring that any restrictions on the exercise of that right is lawful, pursuant to a legitimate aim and necessary to achieve that aim. The rights of the children and families of the foreign terrorist fighters returning to Tunisia should also be protected in accordance with the State's obligations under international law, in particular international human rights law, humanitarian law and refugee law.**